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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

CAL TERHUNE, Director of the California Department of Corrections (LARRY WITEK, Warden - Chino), *Petitioners*,

v.

JOSEPH RAY MCBATH, SR., *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Can a federal court on habeas corpus review of a state law conviction for sufficiency of the evidence under the due process clause of the 14th Amendment to the United States Constitution, simply ignore a prior decision by the state court that the judgment is supported by the evidence presented at trial or must the federal court accord the state appellate court determination deference in assessing the constitutional claim?

PARTIES TO THE PROCEEDING BELOW

Joseph Ray McBath, Sr., respondent herein, was the petitioner and appellant in the appeal before the Ninth Circuit Court of Appeals from the denial of his petition for writ of habeas corpus by the United States District Court for the Central District of California. Respondents and Appellees in the Ninth Circuit proceeding were James Gomez, formerly Warden of the Correctional Training Facility at Soledad, California, where McBath was incarcerated pursuant to the state court judgment at issue in this proceeding when his petition for writ of habeas corpus was filed in the District Court, and the Attorney General of the State of California.

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v.

JOSEPH RAY MCBATH, SR., *Respondent*.

OPINIONS BELOW

The majority and dissenting opinions of the Ninth Circuit Court of Appeals in McBath v. Gomez, et. al., filed August 4, 1997, in No. 96-55964, are unpublished and a copy appears at Appendix A to this petition. The District Court's Judgment and Order Denying Petition for Habeas Corpus and Directing Issuance of Certificate of Probable Cause for Appeal in McBath v. Gomez et al., filed April 12, 1996, in SA CV 94-967 AHS (EE) is unpublished and a copy appears at Appendix B. The Supplemental Report and Recommendation of United States Magistrate Judge on a Petition for Habeas Corpus by a Person in State Custody in McBath v. Gomez, et al., filed October 20, 1995, in SACV 94-967-AHS(EE), is unpublished and a copy appears at Appendix C. The opinion of the California Court of Appeal, Fourth Appellate District Court of Appeal, Division Three, in People v. McBath, filed May 28, 1993, in G011404, is unpublished and a copy appears in Appendix D.

STATEMENT OF JURISDICTION

The Memorandum Opinion of the Ninth Circuit Court of Appeals was filed August 4, 1997. This Court has jurisdiction to review the judgment by the Court of Appeals on a writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

On February 26, 1990, Elly Preciado lived in the Pacific Woods Apartments at 16350 Harbor Boulevard in Fountain Valley, and also worked there as a maintenance man. 1RT 105.[1] He started work that morning around 7:50 a.m., walking around the apartment complex picking up paper. 1RT 123.

At approximately 8:00 a.m., Preciado noticed McBath on the apartment complex grounds. Preciado noticed McBath because he was acting suspicious and Preciado had been advised to be alert to strangers. 1RT 106, 126, 130. McBath wore a dark baseball hat with something on the front, Levis, and a blue jacket. 1RT 107-109, 135. Preciado followed McBath until he (McBath) approached the alcove where the front door to apartment 1101 was located. Thinking McBath knew

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1. "RT" refers to the designated volume of the Reporter's Transcript from the state court trial, which was lodged with the District Court.

someone there, Preciado went about his duties. 1RT 111-113.

Deneva Williams lived at apartment 1101 and was awakened around 8:00 a.m. that morning by a knock on her door. She looked out the front door peephole and saw McBath. She watched him for 30 seconds without responding to his knock because she did not know him. 1RT 31, 33-36, 70, 73 ["I took a good look"].

She decided to return to her bedroom, turned and took about five steps when there was another knock at the front door. She looked out the peephole and again saw McBath. She watched McBath for about a minute and saw him turn away, reach a hand into his back pocket, and turn back to her front door. 1RT 36, 63, 75, 102. When McBath turned back to Williams's front door, she saw the door knob moving. She went to her bedroom and called 911. 1RT 38.

While on the phone with the emergency operator, Williams heard a loud knock on the living room window, then a loud knock on her bedroom window. Next, she heard another knock on the front door, another loud knock on the living room window, and another loud knock on her bedroom window.[2] Finally, she heard a loud bang from the front of her apartment. She later found that the glass in the dining room window had been broken near the window latch. 1RT 40-45, 60.

Orange County Deputy Sheriff Andrew Payne used his siren when he responded to Ms. Williams's apartment. 2RT 176. Shortly after arriving he transported her to a location to view a suspect detained by local police. When they arrived, Williams immediately said the suspect was not the man. 1RT 53; 2RT 166-167, 170. After returning to the victim's apartment, Deputy

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2. The knocks on the windows sounded loud enough to break them. 1RT 77.

Payne was directed to take her to the Ha'Penny Inn on Harbor Boulevard to view another suspect. 2RT 171.

Deputy Carl Dick had seen McBath in front of the Ha'Penny Inn and detained him due to his similarity with the suspect description which had been broadcast. 2RT 159, 161. When Ms. Williams arrived with Deputy Payne, she immediately identified McBath as the man who was at her door. 1RT 54; 2RT 172.

Deputy Payne returned Ms. Williams to her apartment where he also spoke with Preciado. Preciado was asked to look at McBath, who was awaiting transportation in Deputy Payne's car. Preciado identified McBath as the man he had followed to the victim's front door. 1RT 116, 119; 2RT 174, 176.

Both Williams and Preciado identified McBath at trial. 1RT 37, 120. Preciado also identified the hat McBath was wearing at the time he was detained as the hat McBath wore at the apartment. 1RT 153; 2RT 164.

On June 5, 1990, following a trial by jury, McBath was found guilty of attempted residential first degree burglary. Cal. Pen. Code, §§ 664, 459, 460. He was subsequently found, in a court trial, to have suffered three prior serious felony convictions (Cal. Pen. Code, § 667, subd. (a)), and was sentenced on June 21, 1991, to state prison.

On May 28, 1993, the Court of Appeal, Fourth Appellate District, Division Three, filed its opinion affirming the conviction and sentence. The Court of Appeal rejected McBath's assertion that an essential element of his conviction, i.e., intent to steal, was without evidentiary support. See Appendix D. The California Supreme Court denied McBath's petition for review on August 18, 1993.

McBath filed the underlying federal habeas corpus petition in the United States District Court for the Central District of California, which had jurisdiction pursuant to 28 U.S.C. § 2254, on October 25, 1994. CR

1.[3] Pursuant to the order of the Magistrate Judge, issued November 1, 1994 (CR 5), Respondents filed a return to the petition on November 17, 1994 (CR 6), and a supplemental return on December 15, 1994. CR 7. The traverse was filed January 13, 1995. CR 12.

The report and recommendation of the Magistrate Judge was filed August 10, 1995. CR 14. Respondents' objections to the report and recommendation were filed August 30, 1995. CR 15. Pursuant to the September 6, 1995, order of the Magistrate Judge (CR 16), Respondents filed supplemental arguments in opposition to the petition on September 15, 1995. CR 18. The Magistrate Judge's supplemental report and recommendation was filed October 20, 1995 (CR 19) and Respondent's objections were filed November 6, 1995. CR 21.

On April 12, 1996, the District Court issued its order and entered judgment denying the petition. CR 22, 23. McBath filed a notice of appeal on May 8, 1996. CR 24. The District Court issued a certificate of probable cause for the appeal on June 17, 1996. CR 27.

The Ninth Circuit Court of Appeals had jurisdiction of the appeal from the underlying action pursuant to 28 U.S.C. section 2253.

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3. CR refers to the Clerk's Record in the District Court proceeding, which was filed with the Court of Appeals.

REASONS WHY A WRIT SHOULD ISSUE

In Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781, this Court considered "what standard is to be applied in a federal habeas corpus proceeding when the claim is made that a person has been convicted in a state court upon insufficient evidence." Jackson v. Virginia, 443 U.S. at 309, 61 L. Ed. 2d at 567. The standard by which a federal habeas court reviews the sufficiency-of-the-evidence claim challenging a state court conviction "goes to the basic nature of the constitutional right recognized in the [In re] Winship [397 U.S. 358, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970)] opinion." Jackson v. Virginia, 443 U.S. at 313, 61 L. Ed. 570.

> . . . Winship presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof - defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense."

Jackson v. Virginia, 443 U.S. at 316, 61 L. Ed. 2d at 571.

If the prerequisites to federal habeas review have been satisfied, the due process claim is cognizable in a federal habeas corpus proceeding. Jackson v. Virginia, 443 U.S. at 321, 61 L. Ed. 2d at 575. However, this Court recognized that:

> "most meritorious challenges to constitutional sufficiency of the evidence undoubtedly will be recognized in the state courts, and, if the state courts have fully considered the issue of

> sufficiency, the task of a federal habeas court should not be difficult."

Jackson v. Virginia, 443 U.S. at 322, 61 L. Ed. 2d at 575, emphasis added; see id., 443 U.S. at 322, 61 L. Ed. 2d at 576 ["state appellate review undoubtedly will serve in the vast majority of cases to vindicate the due process protection"]; see also id., 433 U.S. at 335, 61 L. Ed. 2d at 584 (Stevens, J., concurring).

Thus, this Court, in Jackson v. Virginia, reiterated what it has long recognized; i.e., that the state courts are equal partners with the federal courts in enforcement of constitutional rights and equally capable of reaching a correct resolution of a constitutional issue. See, Ex parte Royall, 117 U.S. 241, 251-252, 29 L. Ed. 868, 65 S. Ct. 734 (1886).[4] While a state court decision on the constitutional sufficiency question does not totally bar consideration of the issue by a federal habeas court, this Court has specifically noted that the state court decision is "entitled to great weight." Jackson v. Virginia,

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4. In concurring, Justice Stevens aptly noted that there was actually no evidence or analysis supporting a conclusion that the state trial and review process presented any appreciable risk of erroneous factfinding:

> In this case, however, it would be impossible (and the Court does not even try), to demonstrate that there is an appreciable risk that a factfinding made by a jury beyond a reasonable doubt, and twice reviewed by a trial judge in ruling on directed verdict and post-trial acquittal motions and by one or more levels of appellate courts on direct appeal, as well as by two federal habeas courts under the Thompson "no evidence " rule, is likely to be erroneous.

Jackson v. Virginia, 443 U.S. at 333, 61 L. Ed. 2d at 582-583 (Stevens, J., concurring), footnote omitted.

443 U.S. at 322, n. 15, 61 L. Ed. 2d at 575, n. 15, emphasis added.

Of course, this Court refused to foreclose federal habeas review of a sufficiency claim simply because there had been a state court decision on the issue. However, not only did this Court, in Jackson v. Virginia, explicitly include consideration of a state court's resolution of the sufficiency question and imbue that decision with "great weight" in the federal habeas review, this Court also stated that the state court decision "is of course entitled to deference by the federal courts, as is any judgment affirming a criminal conviction." Jackson v. Virginia, 443 U.S. at 323, 61 L. Ed. 2d at 576.

More recently, this Court revisited the question of "whether a federal habeas court should afford deference to state-court determinations applying law to the specific facts of a case." Wright v. West, 505 U.S. 277, 284, 120 L. Ed. 2d 225, 233, 112 S. Ct. 2482 (1992), (Thomas, J., lead opn.) However, the opinions in Wright v. West which reached the issue were sharply divided, leaving the question unanswered.[5]

As Justice Thomas noted, in Jackson v. Virginia, the Court clearly called for deference to, and great weight accorded, the state court determination, but went on, apparently, to call for independent review and analyze the issue *de novo*. Wright v. West, 505 U.S. at 290, 61 L. Ed. 2d at 237, citing Jackson v. Virginia, 443 U.S. at 342-326. Of course, that result followed from the Jackson Court's rejection of no review whatsoever when the state accorded

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5. While the opinions in Wright v. West looked at the issue as dealing generally with mixed questions of law and fact, the issue presented here can be more refined, for as Justice Stevens noted in Jackson v. Virginia, "State judges are more familiar with the elements of state offenses than are federal judges and should be better able to evaluate sufficiency claims." Jackson v. Virginia, 443 U.S. at 336, n. 9, 61 L. Ed. 2d at 585, n. 9.

the sufficiency claim a full and fair hearing on appeal. Jackson v. Virginia, 443 U.S. at 323, 61 L. Ed. 2d at 576. Moreover, there was, at least, some question whether the state appellate court applied the proper standard in its review. Jackson v. Virginia, 443 U.S. at 322. n. 15, 61 L. Ed. 2d at 575, n. 15. Further as noted by Justice Thomas, deferential review was accorded factual findings and, arguably, purely legal issues. Wright v. West, 505 U.S. at 291-295, 61 L. Ed. 2d at 237-240.

Nevertheless, Justice Thomas did not reach the issue, finding that by either standard of review, there was sufficient evidence to support the conviction. Wright v. West, 505 U.S. at 295-297, 61 L. Ed. 2d at 240-241.

Apart from her criticisms of Justice Thomas's opinion, Justice O'Connor sought to reconcile deference with *de novo* review. Wright v. West, 505 U.S. at 305, 61 L. Ed. 2d at 247 (O'Connor, J., concurring) However, her attempt blurs, rather than clarifies the language of Jackson v. Virginia. The notion that a state court decision becomes analogous to persuasive authority certainly begins to address the "great weight" to be accorded. Jackson v. Virginia, 443 U.S. at 322, n. 15, 61 L. Ed. 2d at 575, n. 15. However, consideration is clearly not deference and Justice O'Connor's rejection of deference fails to adequately address or even acknowledge the role and ability of state court's in enforcing federal constitutional rights:

> [T]his does not mean that we have held in the past that federal courts must presume the correctness of a state court's legal conclusions on habeas, or that a state court's incorrect legal determination has ever been allowed to stand because it was reasonable.

Wright v. West, 505 U.S. at 305, 120 L. Ed. 2d at 247 (O'Connor, J., concurring).

This observation, however, begs at least two questions: "Incorrect by whose determination?" and "If reasonable, does not that show a decision which is, at worst, only arguably incorrect?" As has been poignantly observed, this Court is not last in the line of courts because it is correct; it is correct because it is last.

This case illustrates, perhaps as well as any, the ping-pong ball effect of de novo review and the ridicule which it engenders. Twelve jurors unanimously found guilt beyond a reasonable doubt. The sufficiency challenge was rejected by the state appellate court, and review was denied by the state supreme court. The federal magistrate judge concluded there was insufficient evidence, but the district court concluded otherwise. Two judges of the circuit court of appeal found insufficiency, while the third did not. Arguably, there was nothing incorrect in any of these legal determinations, and merely reflected a difference of opinion. Is the decision of the two judges of the circuit court of appeal correct simply because it comes last? Or would justice and the public's perception of the justice system be better served by recognizing that reasonable decisions, carefully reached are properly respected?

Finally, to Justice O'Connor's last point, Congress has now acted and provided statutory force to deference. Anti-Terrorism and Effective Death Penalty Act of 1996, P.L. 104-132, 110 Stat. 1214. Nonetheless, this case like others will not feel the impact of that new law. Lindh v. Murphy, ___ U.S. ___, 117 S. Ct. 2059 (1997). This case presents the opportunity to resolve the uncertainty left in the wake of Jackson v. Virginia and Wright v. West.

CONCLUSION

Petitioner respectfully requests that a writ of certiorari issue.

Dated: September 24, 1997.

Respectfully submitted,

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Attorney:	No. _____ October Term, 1997
DANIEL E. LUNGREN Attorney General of the State of California WILLIAM M. WOOD Deputy Attorney General	**CAL TERHUNE, Director of the California Department of Corrections (LARRY WITEK, Warden - Chino),** Petitioner, v. **JOSEPH RAY MCBATH, SR.** Respondent.
110 West A Street, Suite 1100 P. O. Box 85266 San Diego, California 92186-5266	

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego, in which County the below-stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 1100, San Diego, California 92186-5266.

I have served the within **PETITION FOR WRIT OF CERTIORARI and APPENDICES TO PETITION FOR WRIT OF CERTIORAI TO THE UNITED STATES SUPREME COURT** as follows: To William K. Suter, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and forty (40) copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

ROBERT FRANKLIN HOWELL (3 copies)
ATTORNEY AT LAW
1666 GARNET AVENUE, SUITE 1004
SAN DIEGO CA 92109-3116

Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the twenty fourth day of September 1997.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, September 24, 1997.

Rosemary Carmona
ROSEMARY CARMONA

BEST AVAILABLE COPY

CALIFORNIA

ALL-PURPOSE

ACKNOWLEDGEMENT

STATE OF CALIFORNIA)

COUNTY OF San Diego)

On 9/24/97 (DATE) before me, Christine J. Kaul Notary Public. (NAME, TITLE OF OFFICER - E.G., "JANE DOE, NOTARY PUBLIC")

personally appeared. Rosemary Carmona

personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

PWR1 CHRISTINE J. KAUL Comm. # 1034176 NOTARY PUBLIC CALIFORNIA San Diego County My Comm. Expires July 31, 1998 PWR1

WITNESS my hand and official seal.

Christine Kaul
NOTARY PUBLIC SIGNATURE (SEAL)

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APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

APPENDIX A

[Filed August 4, 1997]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH RAY McBATH, SR.,

Petitioner-Appellant,

v.

JAMES H. GOMEZ, Director of the California Department of Corrections; and the ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Respondents-Appellees.

No. 96-55964

DC No. SA CV 94-967AHS(EE)

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Alicemarie H. Stotler,
District Judge, Presiding

Argued and Submitted April 9, 1997
Pasadena, California

Before: O'SCANNLAIN and TASHIMA, Circuit Judges, and WHALEY,** District Judge.

We review de novo the district court's denial of the habeas corpus petition.1 Martinez-Villareal v. Lewis, 80 F.3d 1301, 1305 (9th Cir.), cert. denied, 117 S.Ct. 588 (1996); Jordan v. Ducharme, 983 F.2d 933, 935 (9th Cir. 1993).2

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit, except as provided by Ninth Cir. R. 36-3.

** Honorable Robert H. Whaley, United States District Judge for the Eastern District of Washington, sitting by designation.

1 Because the parties are familiar with the facts of the case, we find it unnecessary to recite them.

2 The state argues that the standard of review should be different in light of certain provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, signed into law on April 24, 1996. The AEDPA provisions on which the state relies are not applicable here because McBath filed his petition before the AEDPA's effective date. Lindh v. Murphy, No. 96-6298, 1997 WL 338568 (U.S. Jun. 23, 1997) (new provisions of chapter 153 generally apply only to cases filed after Act's effective date of April 24, 1996); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (en banc) (same).

McBath claims that the state did not prove all the elements of the crime charged beyond a reasonable doubt. A claim that the evidence was insufficient to support a conviction is reviewed de novo. Jackson v. Virginia, 443 U.S. 307, 323-24 (1979); see also Wright v. West, 505 U.S. 277, 290 n.7 & 294 (1992) (Thomas, J., plurality opinion); id. at 301-03 (O'Connor, J., concurring); Mitchell v. Prunty, 107 F.3d 1337, 1340 (9th Cir. 1997) (reviewing de novo insufficiency claim brought by habeas petitioner). To prevail on this claim, McBath must establish that, viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found each element of the crime beyond a reasonable doubt. Jackson, 443 U.S. at 319.

McBath was charged with attempted burglary. The instructions required the jury to find that McBath, "at the time of the attempted entry . . . had the specific intent to steal and take away someone else's property, and intended to deprive the owner permanently of such property." Accordingly, the parties agree that, in order to convict McBath of attempted burglary, the jury was required to find intent to steal beyond a reasonable doubt.

We agree with McBath that, even viewing the evidence in the light most favorable to the prosecution, no rational jury could have found the element of intent to steal beyond a reasonable doubt. There simply is no evidence in the record from which a rational jury could infer intent to steal beyond a reasonable doubt. Although the evidence did show that McBath attempted to break into the victim's residence, there is no evidence, beyond the mere attempt at forcible entry, allowing an inference of intent to steal once inside the residence.3

---

3 The state's reliance on California case law suggesting that a jury can always infer intent to steal merely from an unsuccessful entry is misplaced. The cases cited by the state appear to involve California sufficiency-of-the-evidence rules; therefore, they do not speak to the federal sufficiency question before us. To the extent the cited California cases interpret the federal Due Process Clause, they are only persuasive, not controlling. California law only controls the definition of the elements of the crime charged, and there is no dispute here that intent to steal

was an element that the state was required to prove to convict McBath.

It is true, as the state argues, that the circumstances surrounding forcible entry into a dwelling can be used by a jury to find the required intent to steal. However, there is nothing about the particular circumstances present here which would allow a finding of intent to steal. If the intent-to-steal element is to have meaning independent of the element of entry, something more than the naked fact of an attempted entry must be shown before intent to steal can be found. In order for a jury permissibly to infer intent to steal solely from the circumstances surrounding a forcible entry, there must be some rational and articulable connection between those circumstances and the required intent. See, e.g. People v. Terry, 20 Cal.Rptr. 915, 918 (Cal.Dist.Ct.App. 1962) (girdle shoplifting devices found in defendant's bag; other articles of clothing removed from another store earlier that day found in car used by defendant). That connection is not present where, as here, all that the circumstances show is that defendant attempted to break and enter.

The state points to the following six circumstances as permitting an inference of intent to steal: (i) McBath "jiggled" the apartment's doorknob and knocked loudly on the door and on many of the windows until the glass of one window broke; (ii) McBath approached the apartment's door in a suspicious manner; (iii) McBath was not a person the victim knew; (iv) the door was partially hidden from view, since it was in an alcove; (v) McBath approached the apartment at a time when many people are away from their homes at work; (vi) McBath fled as a result of hearing both the window glass break and the sound of an approaching police siren.

It is not clear that all six facts on which the state relies are supported by the evidence. However, even taking all six as proven, we do not find them sufficient to permit a jury to infer intent to steal beyond a reasonable doubt. Taken together, all that the six factors demonstrate, at most, is an intent to commit an illegal act (to break and enter), conceal that act, and avoid responsibility for it. In no way do these factors, even when viewed in the light most favorable to the state, support an inference of an intent to steal.

We agree with the Magistrate Judge that there was simply no evidence of an intent to take any property and that, because the evidence of intent to steal was completely lacking, it can

only be assumed that the jury impermissibly rendered its verdict on the basis of "mere suspicion or speculation." United States v. Thomas, 453 F.2d 141, 143 (9th Cir. 1971).

Accordingly, the district court judgment denying McBath's habeas corpus petition is reversed and the case is remanded for entry of judgment granting the petition and ordering respondents to dismiss the charges against McBath. Burks v. United States, 437 U.S. 1, 17-18 (1978) (double jeopardy prevents re-trial where basis for relief is insufficiency of the evidence).

REVERSED and REMANDED.

McBath v. Gomez, No. 96-55964

O'SCANNLAIN, Circuit Judge, dissenting:

The jury knew McBath approached the victim's door in a suspicious manner and at a time when many people are at work, that the apartment door was partially hidden from view, that he aroused the suspicions of the maintenance man, that he did not know the resident of the apartment, that he knocked on the door loudly, that he jiggled the doorknob, that he tried to pry the door open, that he knocked loudly and aggressively on different windows of the apartment until one of them broke, and that he fled upon hearing both the window glass break and the police sirens.

The jury was entitled to infer, based on its common sense and human experience, that McBath was attempting to enter the apartment with the intention of stealing. See People v. Cepeda, 851 F.2d 1564, 1568 (9th Cir. 1988) (quotations and citation omitted). The inference of intent drawn by the jury here did not cross the thin line that separates logical inferences from mere "suspicion or speculation." The fact that we might not have drawn those inferences or might have drawn contrary inferences is irrelevant to the sufficiency determination; the pertinent inquiry is whether the trier of fact could have reasonably drawn inferences supportive of the judgment. See Payne v. Borg, 982 F.2d 335, 341 (9th Cir. 1992).

Because the district court's decision denying the insufficiency challenge was reasonable in light of the evidence and the reasonable inferences drawn therefrom, I would affirm.

I respectfully dissent.

APPENDIX B

APPENDIX B

[Filed April 12, 1996]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

JOSEPH RAY McBATH, SR., Plaintiff, v. JAMES H. GOMEZ, Warden, et.al., Defendants.	SA CV 94-967 AHS (EE) JUDGMENT

IT IS ADJUDGED that the petition for writ of habeas corpus is denied, and the judgment is entered in favor of respondents.

DATED: April 12, 1996.

ALICEMARIE H. STOTLER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

JOSEPH RAY McBATH, SR., Plaintiff, v. JAMES H. GOMEZ, Warden, et.al., Defendants.	SA CV 94-967 AHS (EE) ORDER DENYING PETITION FOR HABEAS CORPUS AND DIRECTING ISSUANCE OF CERTIFICATE OF CAUSE FOR APPEAL

I.

INTRODUCTION

On or about November 15, 1995, the Final Report and Recommendation of the Magistrate Judge was submitted. The Supplemental Report and Recommendation was filed on October 20, 1995. In the latter, the Magistrate Judge noted that his recommendation in granting the writ of habeas corpus had changed from retrial to dismissal because defendant would have been once put in jeopardy by a trial that resulted in conviction without sufficient evidence.

By this Order, the Court accepts the magistrate judge's findings and recommendations as to all contentions of the petition except the ground found dispositive by the magistrate judge, namely, insufficiency of the evidence, rejects the finding and recommendation pertaining to insufficiency of evidence, and denies the petition for writ of habeas corpus. The Court also directs issuance of a Certificate of Probable Cause for Appeal.

II.

DISCUSSION

The entirety of the record has now been reviewed, and the Court has considered the parties' contentions de novo. First, it should be confirmed that petitioner, for whatever reason, did not include in his Petition the ground of insufficiency of the evidence. Although Mr. McBath enumerated in the form Petition, filed October 25, 1994, the "lack of intent" issue as being raised in prior proceedings, he omitted it from Paragraph 10 which contains the prefatory warning that "every ground" must be stated and admonishes that "if necessary, attach a SINGLE [sic] page only behind this page." It is also true, however, that the petitioner filed on the same day his "Points and Authorities in Support of Petition By State Prisoner For Writ of Habeas Corpus." The Respondent was supplied the full set of petitioner's contentions as soon as the omission of service was called to the Court's attention. (See minute order, September 9, 1995, calling for service on respondent.) At pages 21-22 thereof, petitioner renews his contention that there was insufficient evidence of intent to steal so as to support a burglary conviction.

The better rule is the one urged by Respondent -- all grounds must be stated in the Petition or elsewhere only as ordered by the court and nowhere else -- so that State authorities are placed on notice as to all bases of habeas relief that a petitioner urges. The Court of Appeals has held that additional grounds for relief should be presented in an amended petition or, if so ordered, in a "statement of additional grounds." Where the additional grounds are raised in a traverse, the habeas claims are not cognizable on appeal. Cacoperdo v. Demosthenes, 37 F.3d 504, 507 (9th Cir. 1994), citing King v.

Rowland, 977 F.2d 1354, 1357 (9th Cir. 1992). It follows that the district court is not obliged to consider grounds not stated in the petition.

Because the magistrate judge, the petitioner, and the respondent have all addressed the sufficiency of the evidence, the merits of the petition for writ of habeas corpus are reached.

It is fundamental that the trier of fact resolves conflicts, weighs the evidence, and draws reasonable inferences from basic facts to ultimate facts. Jackson v. Virginia, 443 U.S. 307, 319 (1974). The inquiry here is not whether the reviewing court would have come to the same conclusions but whether the jury could reasonably have drawn inferences supporting the judgment. Payne v. Borg, 982 F.2d 335, 341 (9th Cir. 1992). Moreover, the federal court, faced with a record of historical facts that supports conflicting inferences must presume -- even if it does not affirmatively appear in the record -- that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution. Jackson, at 326. The state court's decision upholding the sufficiency of the evidence is "entitled to great weight." Jackson at 322, n. 15.

Application of these principles to the record here leads to the conclusion that there is sufficient evidence of the elements of burglary to support petitioner's conviction. Because the magistrate judge has summarized completely and thoroughly the evidence and because both petitioner and respondent have likewise presented articulate and fact-intensive expositions concerning their positions as to this issue, it is unnecessary to write another restatement of the record evidence. The Court concludes that there was sufficient evidence of the elements of burglary, including that petitioner was shown to have harbored intent to steal, to meet constitutional standards.

III.

CONCLUSION

Pursuant to 28 U.S.C. § 636(b)(1)(C), the Court now, having read and considered same, accepts in part and rejects in part the findings and recommendations of the United States Magistrate Judge. The Petition for Writ of Habeas Corpus is denied.

IT IS SO ORDERED. The Clerk is directed to enter judgment for respondent accordingly.

IT IS FURTHER ORDERED that the Clerk serve copies of this Order, the reports and recommendations, and Judgment herein by United States mail on all parties.

IT IS FURTHER ORDERED that upon entry of judgment, a Certificate of Probable Cause for Appeal will issue.

Dated: April 12, 1996.

ALICEMARIE H. STOTLER
UNITED STATES DISTRICT JUDGE

APPENDIX C

APPENDIX C

[Filed October 20, 1995]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSEPH RAY McBATH, SR., Petitioner, v. JAMES H. GOMEZ, Warden, et.al., Respondents.	Case No. SACV 94-967 AHS (EE) SUPPLEMENTAL REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE ON A PETITION FOR HABEAS CORPUS BY PERSON IN STATE CUSTODY

This Supplemental Report and Recommendation and the attached Report and Recommendation are submitted to the Honorable Alicemarie H. Stotler, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

1. Summary of proceedings.

On August 10, 1995, the Clerk filed Notice Of Filing Of Magistrate Judge's Report And Recommendation, which was served on the parties, together with a copy of the report and recommendation.

Respondents filed objections to the report and recommendation, stating, among other things, that they had not received a copy of petitioner's points and authorities which were filed with the petition herein. Accordingly, the magistrate judge ordered that respondents be sent a copy, and they were also given approximately four additional weeks to file supplemental arguments. Respondents timely filed supplemental arguments on September 15, 1995. Having carefully considered the objections and the supplemental arguments, the magistrate judge finds no good reason set forth for changing the recommendation in any respect. The objections set forth by respondents are not persuasive that there was sufficient evidence to satisfy the federal constitutional standard for proof of the specific intent required for burglary.

2. Discussion.

a. Consideration of sufficiency of evidence claim.

Petitioner was convicted in Orange County Superior Court Case Number C-78440 of attempted burglary after he attempted, unsuccessfully, to break into the victim's residence. The only close issue in this case is whether there was sufficient evidence at trial to support the conviction. Respondents first argue that petitioner's claim should not even be considered because it was not raised in his petition herein. The argument would be well-taken if the meaning of the word "petition" were limited solely to the fill-in-the-blanks form commonly used in this district. However, petitioner filed with his form a paper entitled "Points and Authorities In Support of Petition etc." Through no fault of petitioner, a copy of that paper was not sent to respondents when the clerk mailed the form petition to them.

Respondents had no reason to be aware of the points and authorities, and petitioner had no reason to know that respondents did not have a copy, until after the magistrate judge's report and recommendation was filed. As noted above, when the defective service became known, the magistrate judge ordered that respondents be sent a copy, and they were given approximately four weeks to respond to it. Strangely, respondents continue to contend that because the insufficiency

of evidence claim was in the late-served paper, respondents were not given proper notice of it or a proper opportunity to respond. Because respondents have not sought more time to respond, and have in fact responded, the magistrate judge concludes that they were not prejudiced by late service of the paper.1 Accordingly, the magistrate judge adheres to the position taken in the report and recommendation that the insufficiency of evidence claim should be considered on the merits.

b. Sufficiency of evidence.

Turning again to the merits, the magistrate judge reiterates the statement in the report and recommendation that **this is a close case.** However, the recommendation remains the same: the federal constitutional standard of sufficiency of evidence was not satisfied by the evidence presented at trial.

Contrary to respondents' argument, the court is not deciding whether petitioner had the requisite intent to steal at the time an unlawful entry was attempted. Rather, pursuant to its obligations under 28 U.S.C. § 2254 and Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560 (1979), the court considers only whether, from the evidence presented at petitioner's trial, a reasonable jury could infer beyond a reasonable doubt that petitioner intended to commit a theft, a necessary element to support his conviction for attempted burglary.

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1 Cacoperdo v. Demosthenes, 37 F.3d 504 (9th Cir. 1994), cert. denied, 131 L.Ed.2d 232 (1995), does not bar consideration of petitioner's claim where the court actually considered the claim to have been properly raised and respondents were properly advised of it.

That the evidence was sufficient to satisfy California state law requirements is not subject to review here; and the law as argued by respondents, namely, that an intent to steal may be inferred from circumstantial evidence surrounding an attempted forcible entry is supported by the authorities cited.2 However, if a conviction for attempted burglary may be had solely on evidence of any attempted forcible entry, respondents fail to explain how burglary differs from mere breaking and entering.

Respondents cite several California state court opinions which essentially hold that an intent to steal can be inferred from circumstantial evidence surrounding an actual unlawful entry. In the cases cited by respondents, and those cited by the California Court of Appeals in its opinion (see Supplemental Answer, exh. B), however, this legal principle was applied to a greater quantity of

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2 Respondents urge the court to defer completely to the determination of the issue made on direct appeal by the California Court of Appeals, citing the Supreme Court's decision in Wright v. West, 505 U.S. 277, 120 L.Ed.2d 225 (1992). However, that decision did not change this court's obligation to independently say what the law is in matters raising federal constitutional claims. See id., at __, 120 L.Ed.2d at 247 (O'Connor, J., concurring)("federal courts, even on habeas, have an independent obligation to say what the law is."). Virtually all habeas petitions come to this court after a state appellate court has already decided the same issues. Respondents position is, presumably, that all sufficiency of evidence claims should be summarily dismissed.

circumstantial evidence than exists in petitioner's case.3 Moreover, it is noteworthy that, had California law required only a simple breaking and entering, the courts in the cases cited would have had no reason to discuss the existence of circumstantial evidence to support proof of an intent to steal.

The only evidence from which the jury could infer an intent to steal in petitioner's case was his conduct as observed by victim Williams and the maintenance man, Preciado. Williams testified, in essence, that she heard a knocking on the door, saw petitioner outside, heard someone attempting to turn the doorknob, and heard a knocking on the windows until one broke.4 Preciado saw petitioner at 8:10 a.m. on the morning of the incident. (Reporter's Transcript "RT" 148). Preciado testified that petitioner "looked kind of strange being around there, because we had been told to be careful of the people that come through there." (RT 106). Preciado also testified that he took special notice of petitioner, as he always did when observing a stranger, because he had been instructed to do so by his employer. (RT 126).

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3 See, e.g., People v. Stewart, 113 Cal.App.2d 687 (1952)(defendant forcibly entered dwelling at nighttime and property removed from dwelling was later found in his possession); In re Anthony M., 116 Cal.App.3d 491, 172 Cal.Rptr. 153 (1981)(circumstantial proof of flight from burglarized liquor store and presence of liquor bottles out of place on counter, in conjunction with officer's observation of juvenile's flight from scene, constituted evidence of juvenile's intent to commit grand theft); People v. Provencio, 210 Cal.App.3d 290, 258 Cal.Rptr. 338 (1989)(witness observed defendant in vicinity of burglarized homes and saw him with object resembling property removed from her home); People v. Terry, 202 Cal.App.2d 604, 20 Cal.Rptr. 915 (1962)(girdle shoplifting devices found in defendant's car and other suspicious behavior observed by store clerk supported intent to commit theft); People v. Martin, 275 Cal.App.2d 334, 79 Cal.Rptr. 769 (1969), cert. denied, 397 U.S. 1026 (1970) (substantial evidence of actual breaking and entering coupled with police officer's observation of defendant fleeing building after police arrived at scene supported finding of intent to steal); People v. Franklin, 153 Cal.App.2d 795 (1957)(defendant, who was observed by

victims inside their home at predawn hours, was arrested without shoes which were later found at entrance to victims' apartment building, supporting inference of intent to steal); People v. Fitch, 73 Cal.App.2d 825 (1946)(intent to commit theft inferred from defendant's presence inside restaurant with broken window and fact that box containing gum had been moved).

4 See discussion, Report at 2, 19-21.

Preciado also testified that petitioner and he looked at each other for a moment, then petitioner walked toward some stairs as if he knew the people who lived there, so Preciado continued on his way collecting papers. (RT 112-113, 126-129). All that can be reasonably inferred from this evidence is that Preciado took careful note of petitioner and, thus, could correctly identify him.

Preciado testified that petitioner "looked like he was looking at something or looking for something," and he thought this was suspicious. (RT 130). This description of petitioner's behavior, however, contributes nothing tending to show an intent to commit a theft. Respondents contend otherwise, claiming that the door petitioner approached was "partially hidden from view, as it was in an alcove." (Supplemental Arguments in Opposition to Petition at 7). The portion of the transcript cited by respondents, RT 111-113, however, does not support this claim. But even accepting this as true, it does not indicate an intent to commit theft where petitioner was clearly visible to Preciado through the slats in the stairwell. (RT 115-116).

Moreover, contrary to respondents' contentions, there was no evidence that petitioner fled the scene because he heard police sirens. The only testimony about sirens was from Sheriff's Deputy Payne, who had been dispatched to Williams' apartment to answer her 911 call. Deputy Payne received the radio call at 8:25 a.m. (RT 179). It took him approximately 15 minutes to arrive at the scene. (RT 179). He testified that he turned his siren off approximately one-half to three-quarters of a mile from the apartment. (RT 176). He could hear other sirens in the area, however, he did not observe anyone--much less petitioner--fleeing from the area. (RT 176, 181). Given that the attempted entry occurred shortly after 8:00 a.m., the probative value of evidence of sirens nearly 40 minutes later is infinitesimal.

Likewise, Preciado did not see petitioner run away from the scene. (RT 148). He apparently observed police after their arrival at the scene, but did not testify about hearing any police sirens. (RT 138-139). A reasonable trier of fact could not infer from this evidence either that petitioner was scared away by the sound of approaching sirens or that he fled the scene in a hurry.

Petitioner was indisputably later observed exiting the office of the Ha'Penny Inn, a quarter mile from Williams' apartment, at about 9:00 a.m., by Sergeant Dick. (RT 159-160, 162).

Sergeant Dick testified that petitioner did not flee and was very cooperative. (RT 163). Thus, a reasonable trier of fact could not infer any unlawful intent from petitioner's behavior when he was approached by the police.

Under Jackson, could any rational trier of fact find that the evidence above was proof beyond a reasonable doubt that petitioner attempted to enter Williams' residence with the intent to steal? Although there was evidence of an attempted entry, there was simply no evidence of an intent to take any property.

A conviction based on insufficient evidence violates due process. Jackson v. Virginia, 443 U.S. at 324, 61 L.Ed.2d at 576-77. While it is true that the government "need not exclude all inferences or reasonable hypotheses consistent with innocence . . ., the record must contain sufficient probative facts from which a factfinder could reasonably infer a defendant's guilt, under the beyond a reasonable doubt standard." Mikes v. Borg, 947 F.2d 353, 357 (9th Cir. 1991)(citation omitted).

Moreover, "[w]hile inferences from facts which have been established by circumstantial evidence may be sufficient to sustain a verdict of guilty,[ ] mere suspicion or speculation cannot be the basis for creation of logical inferences." United States v. Thomas, 453 F.2d 141, 143 (9th Cir. 1971), cert. denied, 405 U.S. 1069 (1972)(citation omitted). The absence of sufficient evidence to prove the element of an intent to steal means that the prosecution obtained a guilty verdict without meeting its burden of proving each element of the offense.

This is not to suggest that attempted breaking and entering is not a crime in California or that petitioner's conduct was blameless. "The constitutional necessity of proof beyond a reasonable doubt is not confined to those who are morally blameless. [ ] Under our system of criminal justice even a thief is entitled to complain that he has been unconstitutionally convicted and imprisoned as a burglar." Jackson v. Virginia, 443 U.S. at 323-24, 61 L.Ed.2d at 576. Petitioner has not been shown to be either a thief or a burglar.5

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5 This is not to imply that the California courts could not validly construe the California statute to define burglary as any attempted forcible entry of a dwelling house. That, however, was not what the jury was told. The jury was instructed that the attempted entry must be with an intent to steal property. It must

be assumed that the jury found an intent to steal, not merely an attempted forcible entry.

Because the evidence presented at petitioner's trial on the element of intent to commit a theft was so lacking, it can only be assumed that the jury impermissibly rendered its verdict on the basis of suspicion and speculation. Accordingly, the conviction cannot stand. United States v. Thomas, 453 F.3d at 143.

The question remains what relief is petitioner entitled to receive. Since the basis for vacating the conviction is insufficient evidence, the Double Jeopardy Clause prohibits retrial of petitioner. See, Burks v. United States, 437 U.S. 1, 18, 57 L.Ed.2d 1, 14 (1978); United States v. Weems, 49 F.3d 528, 530 (9th Cir. 1995).

Accordingly, IT IS THEREFORE RECOMMENDED that the Court approve these reports and recommendations, enter judgment GRANTING the petition, and order respondents to dismiss the charges against petitioner in Orange County Superior Court Case No. C-78440. Because this report and recommendation differs from the August 10, 1995, Report and Recommendation, in that it recommends that the charges against petitioner be dismissed, rather than that he be retried, the parties may, within 20 days hereof, file objections to that part of this supplemental report and recommendation.

Dated: October 19, 1995.

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Elgin Edwards
United States Magistrate Judge

APPENDIX D

APPENDIX D

[Filed May 28, 1993]

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE

STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH RAY MCBATH, SR., et.al., Defendant and Appellant.	G011404 Super. Ct. No. C-78440 OPINION

APPEAL from a judgment of the Superior Court of Orange County, William W. Bedsworth, Judge. Affirmed.

Robert F. Howell, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Rudolph Corona, Jr., Supervising Deputy Attorney General and William M. Wood, Deputy Attorney General, for Plaintiff and Respondent.

* * *

Joseph Ray McBath, Sr. appeals from the judgment sentencing him to prison for 16 years: five years each for three prior serious felony convictions and one year -- the low term -- for the new conviction of attempted residential burglary. A separate prior prison term enhancement was struck by the sentencing judge.

McBath contends the evidence was insufficient to sustain the conviction for the attempted burglary, and that he was deprived of effective assistance of counsel during the trial. He asserts the instruction on burglary amounted to a directed verdict, which mandates reversal. He also complains the trial court failed to instruct the jury sua sponte on the need for unanimity on the factual basis for the verdict.

In the alternative, he argues his sentence was improper, requiring remand, because the court ordered the prior serious felony enhancements to be served consecutive to each other, and failed to strike one of those three enhancements.

We affirm the judgment in its entirety.

FACTS

Elly Preciado was the maintenance man -- as well as a resident -- for an apartment complex in Fountain Valley. He had just started working one morning when he noticed McBath -- who was not a resident -- wandering around the complex. Preciado became concerned because the man "looked strange." He followed him. However, when McBath entered an alcove serving as the entryway for one of the apartments, Preciado returned to his work, assuming the man knew the resident of that particular unit.

That assumption was wrong. Deneva Williams was the resident of the apartment, and she was still in bed when McBath approached the front door and knocked. She was not expecting anyone, so she quietly went to the front door and peered through the peephole. She saw McBath and watched him for about 30 seconds; she did not respond to his knock because she did not know him. She began to return to her bedroom when the knocking began again. She went back to the peephole and again observed McBath. This time she stayed at the door, watching his every move. He started to turn away, then reached

his hand into his back pocket and turned back toward the doorknob. As he did this, Williams noticed the front doorknob move. She strode to her bedroom telephone and dialed "911."

As Williams talked to the emergency operator, the knocking increased in frequency and ferocity. The person knocking then moved; he struck the bedroom window, the living room window and the front door. He circled the apartment twice, banging with greater and greater force. Finally, one of the knocks resulted in a loud noise of something breaking. While Williams was still on the phone, the knocking stopped, police sirens approached her house, and a deputy sheriff came to her door. Williams discovered her dining room window was broken in the middle, next to the latch, and glass was scattered on the floor.

Williams was driven by the deputy to view a man stopped a few blocks away. She told the officer the man was not the person knocking on her door. As he returned her to her apartment, he received word that McBath was detained a short distance from Williams's home. He then drove her to the spot where she immediately and positively identified McBath as the man who she observed at her door a few minutes before.

When the deputy escorted Williams home, he met Preciado who informed the officer that he had also seen the man. Preciado walked to the edge of the complex, where McBath was already under arrest and waiting to be taken to the station. Preciado positively identified him as the man who approached Williams's apartment, based on his clothes, facial hair and face. Both Williams and Preciado identified McBath at trial. Preciado also identified the baseball cap retrieved from McBath at his arrest as the one the man had been wearing at the complex.

The finding on the prior conviction enhancements was bifurcated from the issue of culpability for the new offense. McBath also waived his right to have a jury hear the evidence of the prior convictions. Before the court trial on that issue, McBath brought a motion to relieve and substitute trial counsel, which was granted. Newly appointed counsel then brought a motion for new trial based on incompetency of trial counsel. The judge denied the motion after a full evidentiary hearing. The court trial was then held, and the enhancements found to be true. Sentence was imposed -- with the court ordering the

low term for the attempted burglary and striking the one-year enhancement for a prior prison term. McBath then filed a petition for writ of habeas corpus asserting ineffective assistance of trial counsel with us. We issued an order to show cause returnable in the trial court. The lower court held a full evidentiary hearing, denying McBath's petition and finding his attorneys had advised him not to testify and he had acquiesced in that decision.1 McBath, representing himself, then filed a new motion for new trial. The motion was denied.

DISCUSSION

I

Sufficiency of the Evidence

McBath contends there was no evidence to support an essential element of the crime of attempted burglary: the intent to commit theft. The standard of review is well established. We must "view the evidence in the light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (People v. Johnson (1980) 26 Cal.3d 557, 576, internal quotation marks omitted.) In addition, "[w]hen the evidence justifies a reasonable inference of felonious intent, the verdict may not be disturbed on appeal." (People v. Matson (1974) 13 Cal.3d 35, 41 [overruled on other grounds in Williams v. Superior Court (1984) 36 Cal.3d 441, but see People v. Sandoval (1992) 4 Cal.4th 155, 172-174].)

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1 We take judicial notice of our own court files in In re Joseph Ray McBath (G012617), a petition for writ of habeas corpus on grounds of ineffective assistance of counsel and deprivation of the right to testify. (Evid. Code, § 452, subd. (d).)

Evidence of an unlawful and forced entry into the home of another is sufficient to support the inference of a larcenous intent. (People v. Stewart (1952) 113 Cal.App.2d 687, 691.) McBath's breaking the window constitutes a forced entry, even though he was interrupted in his efforts to complete the crime (probably by the sound of the approaching sirens). (In re Anthony M. (1981) 116 Cal.App.3d 491, 501.) And the victim's observation of McBath repeatedly knocking on her door and windows, immediately preceding the burglary attempt, is not without substantial probative value. (See e.g., People v. Provencio (1989) 210 Cal.App.3d 290, 307.) It was obviously his means of ascertaining if the home was empty, as well as his method to break the window to gain entry. Thus, there was evidence of preparation and planning. (See also People v. Terry (1962) 202 Cal.App.2d 604, 608 [defendant's possession of girdles designed with hooks to hold stolen clothes concealed beneath one's outer clothing was evidence of larcenous intent for burglary].) A reasonable trier of fact could easily infer McBath intended to break into the apparently empty home to steal (cf. People v. Martin (1969) 275 Cal.App.2d 334, 339 ["a burglarious intent can reasonably be inferred from an unlawful entry alone . . . ."]), and then fled when the noise of the breaking glass and approaching sirens scared him. (Ibid.)

II

Ineffective Assistance of Counsel

McBath asserts his trial counsel deprived him of his constitutional right to competent counsel by failing to challenge Preciado's identification of him. In such a claim, the defendant bears the burden of proving "by a preponderance of evidence that the attorney's performance fell below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's conduct,

the result of the proceeding would have been different." (People v. Mincey (1992) 2 Cal.4th 408, 449.)2

McBath has failed to meet his burden. No matter what counsel did, or did not, do (see fn. 2, ante), Preciado's identification was merely cumulative evidence to the identification made by Williams. Williams, a young woman with no eyesight problems, clearly and positively identified McBath. Preciado's identification was corroborative, and therefore helpful to the prosecution, but it was not pivotal. McBath has failed to show that, but for counsel's failure to attack Preciado's identification, he would not have been convicted.

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2 Although it is not essential for our determination on appeal, we note the issue of counsel's competence has been litigated twice before: the hearing on the motion for new trial -- which was denied -- resulted in testimony from four witnesses on this subject, as did the hearing following the order to show cause returnable in the superior court, our answer to McBath's initial petition for writ. This initial petition was denied by the superior court, which specifically found: (1) counsel had adequately investigated the alibi defense to make the justified, tactical decision to reject it; (2) Frank Brown was entirely incredible; and (3) McBath was not denied his right to testify in his own behalf, in that he never told his attorneys that he wanted to.

III

The Burglary Instruction

The Attorney General concedes the burglary instruction as given was erroneous; since McBath's trial, the instruction has been modified. (See CALJIC No. 14.50 (1990 pocket pt.).) The only question is the appropriate remedy for the error.

CALJIC No. 14.50, as given, informed the jury that "Every person who attempts to enter any structure of the type shown by the evidence in this case with a specific intent to steal . . . the personal property of another of any value, and with the further specific intent to deprive the owner permanently of such property is guilty of the crime of attempted burglary . . . ." (Emphasis added.) CALJIC No. 14.50, as modified in 1990, states, "Every person who enters any [building],[_____], [with the specific intent to steal . . . the personal property of another of any value and with the further specific intent to deprive the owner permanently of such property] . . . is guilty of the crime of burglary in violation of Penal Code, Section 459." McBath concludes the instruction as given to the jury directed a verdict against him on a factual finding essential for an element of the offense. Such an error is, in his opinion, reversible per se.

We do not agree. When an erroneous jury instruction makes "an element of the offense . . . conclusively presumed, the effect of the error appears to be measured by the 'harmless beyond a reasonable doubt' standard set forth in Chapman v. California (1967) 386 U.S. 18, 21. [Citations.] But when the error renders the trial 'fundamentally unfair,' the error is reversible per se. [Citations.]" (People v. Hedgecock (1990) 51 Cal.3d 395, 410.) Thus, we examine the entire record to determine the consequences of this particular instruction.

The jury received another instruction requiring it to find the nature of the building. It was instructed that, "If you should find the defendant guilty of attempted burglary in this case, you must determine the degree thereof and state that degree in your verdict. [¶] There are two degrees of attempted burglary. [¶] Every attempted burglary of an inhabited dwelling house is burglary of the first degree. [¶] All other kinds of attempted burglary are of the second degree. [¶] Now, that

definition includes the term 'inhabited dwelling house.' An inhabited dwelling house is a structure which is occupied and customary [sic] used as a dwelling . . . .[¶] If you find the defendant guilty of the crime of attempted burglary, but have a reasonable doubt as to whether it is of the first or second degree, you must find him guilty of that crime in the second degree." The jury was then instructed it could find McBath guilty of the lesser included offenses of vandalism or loitering if it failed to be satisfied beyond a reasonable doubt that he was guilty of attempted burglary. They returned a verdict of guilty of attempted burglary, "first degree -- residential burglary."

The only evidence of a structure presented to the jury was that it was a residence. There was absolutely no conflict over the nature of the building. It was indisputably a "structure which has [the] capacity to contain, and is designed for the habitation of, man or animals, or the sheltering of property." (People v. Brooks (1982) 133 Cal.App.3d 200, 206-207.) The jury found it was a residence. The nature of the building was resolved by the jury to be a residence. Although the initial instruction essentially removed the building's description from the jury's examination, the succeeding instruction returned the question to it.

In a case similar to the one at hand, the jury was instructed that if it found the defendant guilty of burglary, it was burglary in the first degree. (People v. Jarrell (1987) 196 Cal.App.3d 604, 607.) Noting "a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict [citations] regardless of how overwhelming the evidence may point in that direction" (ibid.), the error was deemed harmless. (Id. at p. 610.) "The United States Supreme Court has stressed that the errors to which the Chapman standard does not apply 'are the exception and not the rule.' [Citation.] The instruction here did not 'totally deprive [Jarrell] of his right to jury trial' on every essential element of the crime of burglary. [Citation.] Application of the harmless error rule here will 'promote[] public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.' [Citation.]" (Ibid., emphasis in original.)

The Jarrell court noted the uncontroverted testimony was that the building in question was the victim's home. "No

evidence was presented to establish that Mr. Hill's home was not 'an inhabited dwelling house.' Indeed, the defense conceded the burglary, disputing only the identity of the burglar." (Id. at p. 611.) Based on this evidence and the application of the Chapman rule, the instructional error was harmless beyond any reasonable doubt.

And so it is here. The jury ultimately found the building was a residence in its determination of the degree, even if it did not do so in its decision on the attempted burglary. The evidence was uncontroverted; even the defense conceded the building in question was Williams's home. The only issues contested at trial were the identity of the "knocker" and his intent at the time of the knocking.3 We are confident the error was harmless beyond a reasonable doubt.

IV

Unanimity Instruction

McBath complains the trial court deprived him of due process of law by failing to instruct the jury sua sponte that it must unanimously agree on a single factual basis for conviction.4 He contends the jury could have convicted him of the attempted burglary based on the turning of the doorknob, or on the breaking of the window. Thus, he may have been convicted although the jury was not unanimous on which facts supported the single conviction.

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3 Defense counsel conceded the vulnerable position he placed himself by making two alternative arguments. The inconsistency between arguing (1) that McBath was not the perpetrator but, (2) even if he was, he did not intend to steal anything, was obvious. However, he stressed it was the prosecution's burden to clear up the inconsistencies in the evidence, not his.

4 McBath proposes the court had to instruct the jury sua sponte with the following: "The defendant is accused of having committed the crime of _____ [in Count ____]. The prosecution has introduced evidence tending to prove that there is more than one [act] [or] [omission] upon which a conviction

[on Count____] may be based. Defendant may be found guilty if the proof shows beyond a reasonable doubt that [he][she] committed any one or more of such [acts] [or] [omissions]. However, in order to return a verdict of guilty [to Count __], all jurors must agree that [he] [she] committed the same [act] [or] [omission] [or] [acts] [or] [omissions]. It is not necessary that the particular [act] [or] [omission] agreed upon be stated in your verdict." (CALJIC No. 17.01 (5th ed. 1988 bound vol.).)

We note at the outset that this issue was never raised during the trial. Neither the prosecutor nor the defense even mentioned it in the conference regarding instructions or argument.

"A unanimity instruction is required only if the jurors could otherwise disagree which act a defendant committed and yet convict him of the crime charged. [Citations.]" (People v. Beardslee (1991) 53 Cal.3d 68, 93, internal quotation marks omitted.) But "[t]he unanimity instruction is not required [at all] when the acts are so closely connected in time as to form part of one transaction. [Citations.] This branch of the 'continuous conduct' exception [cite] applies if the defendant tenders the same defense or defenses to each act and if there is no reasonable basis for the jury to distinguish between them. [Citations.]" (People v. Crandell (1988) 46 Cal.3d 833, 875.)

The exception is most apt, considering the facts in this case. The prosecution presented one continuing set of facts to the jury as proof of the single charge: a man attempted to gain entry into Williams's home by repeatedly knocking on all the doors and windows of the house, and McBath was that man.5 To this evidence, the defense responded with two arguments: he was not that man, but even if he was, he did not intend to steal anything once entry was effected. Under these circumstances, it is highly speculative that any juror would separate each subsumed part of this set of facts and argue one fact was proven while another was not. Consequently, the trial court was not

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5 Had the defense complained of this potential problem before the trial commenced, the prosecution could have "elected" which of the two facts it was relying on as proof of the attempted burglary. Such an election eliminates the need for an unanimity instruction. (See People v. Gunn (1987) 197 Cal.App.3d 408, 412.) Unfortunately, no complaint was entered and no election stated. However, the prosecution presented only one argument: the single set of facts comprised the crime, not any combination of its composite parts. In a very real sense, the election was made, limiting the jury's consideration to the one set of facts.

required to tell the jury -- without at least McBath's request -- that it had to agree which specific parts of that continual knocking constituted the actual crime.6

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6 McBath's reliance on People v. Melendez (1990) 224 Cal.App.3d 1420 is misplaced. In Melendez, the unanimity instruction was held to be mandatory "[w]here a single crime can be proven by different theories based on different acts and at least two of these theories rely on different evidence, and where the circumstances demonstrate a reasonable possibility that a juror will find one theory proven and the other not proven but that all of the jurors will not agree on the same theory . . . ." (Id. at pp. 1433-1434.) In the instant case, none of these prerequisites is met.

V

The Sentence: The Denial of the Motion to Strike

One of the three prior serious felony convictions for which McBath's sentence was enhanced was a 1979 conviction for residential burglary and attempted burglary in Orange County. McBath requested the sentencing court in the instant case to strike the 1979 conviction because he may not have understood the consequences of his plea when he pleaded guilty. The sentencing court denied his request, and he contends the denial was an abuse of discretion. We emphasize McBath is not asserting insufficiency of evidence to prove the truth of the enhancement allegation; he is only attacking the denial of his motion to strike. (See Curl v. Superior Court (1990) 51 Cal.3d 1292, 1303, fn. 6, for a discussion of the importance of the distinction.)

The denial of the motion to strike the 1979 prior conviction was not an abuse of discretion; it was inevitable based on the evidence. During the hearing on the motion to strike,7

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7 A great deal of McBath's problem here emanated from the irregular manner in which he raised his complaint against the prior conviction in the trial court. Clearly, an attack on the constitutional validity of a prior conviction is to be heard and decided by a trial court prior to presentation to the trier of fact. (Curl, supra, (1990) 51 Cal.3d 1292, 1302, citing People v. Coffey (1967) 67 Cal.2d 204, 215.) Waiting until after the jury renders a guilty verdict on the underlying charge to mount a collateral attack on a felony conviction is not "in the interest of efficient judicial administration . . . ." (Coffey, supra, 67 Cal.2d at p. 215.) Moreover, it then places on the sentencing judge a double burden: to find the truth of the prior conviction and its constitutional validity. And it does so without giving either the prosecution or the trial court advance notice of the attack. Although the suggestion has been made before, we reiterate it here: collateral attacks on the constitutional validity of a prior conviction should be made with proper notice prior to trial. (Curl, supra, 51 Cal.3d at p. 1302, and p. 1304, fn. 7.)

McBath referred to a discussion embodied in a transcript of the 1979 change of plea. There, he had told the judge during sentencing that he had been promised a five-year term and wanted to withdraw his plea once the sentence of seven years was pronounced. The sentencing court noted the change-of-plea form stated he was pleading guilty with no promises, and that he was aware of the seven-year term which was possible for the offenses. McBath's response was that his attorney had made that representation to him; his attorney denied any such representation on the record. The 1979 sentencing court then imposed the seven years.

In the instant case, again the defense waited until sentencing and then attacked the 1979 conviction, alleging the record failed to prove McBath was adequately advised of the consequences of his plea at the time of the entry of the plea in 1979. The trial court read the transcript and rejected the allegation. The change-of-plea form from 1979 -- which the trial court had before it as well as the transcript -- clearly showed McBath was told the maximum possible sentence he faced; he entered his plea anyway.

A collateral attack on the constitutional validity of a prior conviction places "the burden of proof [on the defendant] to establish that he did not competently and intelligently waive his constitutional right[s] . . . .[Citations.]" (Curl, supra, 51 Cal.3d at p. 1303.) This means the prosecution "need only make a prima facie showing of the existence of the prior conviction . . . . The burden of proving the constitutional invalidity of the prior conviction, however, lies with the defendant who is collaterally attacking the prior judgment . . . ." (Id. at p. 1304, fn. 7.) The reason for this lies not only in Evidence Code section 550 -- which places the "burden of producing evidence as to a particular fact . . . on the party with the burden of proof as to that fact" -- but also in the statutory presumption "that official duty has been regularly performed" (Evid. Code, § 664), and the similar statutory presumption that a court "acted in the lawful exercise of its jurisdiction." (Evid. Code, § 666.)

McBath responds that the language in Curl is inapplicable to him because Curl's prior conviction was a murder conviction alleged as a special circumstance in a capital case. He asserts the inherent difference between a general prior felony conviction enhancement under Penal Code section 667

and a previous murder under Penal Code section 190.2, subdivision (a)(2), necessarily renders procedural protections for the more serious inapplicable to the general enhancement. But Curl's provisions are lifted directly from Coffey, supra, 67 Cal.2d 204, which dealt entirely with a general prior conviction, unrelated to any murder. McBath's attempt to distinguish Curl fails.

In applying Curl's rules to the situation before us, we note the prosecution had made its prima facie showing of the existence of the conviction: according to the record, the court had before it eight exhibits, containing the certified copies of four felony convictions and the four prison document packets for each of those convictions. Additionally, the certified, change-of-plea form from the 1983 conviction also contained McBath's personal admission of his prior felony convictions, including the 1979 conviction.

We also note the defense asked the trial court to read the "transcript as a whole" from the sentencing hearing on the 1979 guilty plea. The transcript noted McBath's allegation at the 1979 sentencing that his attorney had told him he would only receive five years; the transcript recorded his attorney's denial of that averment and the 1979 court's examination of the change-of-plea form contradicting McBath's allegation. The trial court then read the transcript, reviewed all the documents and found the enhancements true beyond a reasonable doubt.

McBath failed to meet his burden of proving the constitutional invalidity of the 1979 conviction. To do so, he had to prove the court failed to tell him at the time of the entry of the guilty plea of the maximum possible consequences which he faced and that the court's failure prejudiced him. (See People v. Howard (1992) 1 Cal.4th 1132, 1174-1175; cf. Boykin v. Alabama (1969) 395 U.S. 238, 243-244; cf. In re Ronald E. (1977) 19 Cal.3d 315, 320-321.) The transcript, and the change-of-plea form, reflected he was so advised. His allegations concerning the 1979 sentencing do nothing to contradict the fact that he was informed of the maximum punishment when he pleaded guilty.8 The court's denial of the motion to strike was proper.

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8 McBath appears to argue that we should review any attack on a prior conviction on the basis of the defendant's subjective understanding of the consequences of his plea, and

not on an objective assessment of what advice he was given. If his approach was the law, every felony conviction would be successfully attacked as constitutionally infirm.

VI

The Sentence: Consecutive Terms

McBath contests the trial court's ordering each of the three prior serious felony enhancements to be served consecutively to each other. McBath contends the court erroneously believed it had no discretion but to order such a consecutive sentence; he opines the statute could, and should, be read to permit an order imposing concurrent terms for such an enhancement, as long as the enhancements were ordered consecutive to any new offense's term.

We agree with McBath that the language of Penal Code section 667, subdivision (a), is controlling. It states, in pertinent part, "In compliance with subdivision (b) of Section 1385, any person convicted of a serious felony who previously has been convicted of a serious felony in this state . . . shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively." (Emphasis added.) As we stated in People v. Valencia (1989) 207 Cal.App.3d 1042, 1046-1047, the statutory language is clear and unambiguous: each term must be served consecutive to any other term. McBath provides us with no compelling reason to revisit the argument.

VII

Disposition

The judgment is affirmed.

SILLS, P. J.

WE CONCUR:

MOORE, J.

SONENSHINE, J.